Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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81-1293

No.

IN THE

Supreme Court of the United States

October Term, 1981

GEORGE S. GOLDSTEIN, Ph.D.,
Secretary, New Mexico Health and Environment Department,
Petitioner,

v.

JAN NUNEZ, BRENDA YTURRALDE, DEBBIE CASAUS, ARCELIA PEYTON, BERNICE MARTINEZ, PAULINE McDANIELS, MARY ANN CHAVEZ, JESSIE GOMEZ, ANA BENAVIDEZ, MARIA GOMEZ, LEONA VASQUES, JOANN McCUTCHEON, DOROTHY PARKER, DOLORES MARTINEZ, CELINA SAAVEDRA, RUTHIE WARE, LUCINDA WARE, NEW MEXICO COUNCIL ON FOOD NUTRITION AND HEALTH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

This case presents issues in three areas where this Court has previously provided some guidance, but where additional determinations are obviously needed: What *laws* of the United States impose rights and obligations enforceable against the States in civil rights actions? How is the Attorney's Fees Awards Act affected by consideration of innocent parties, as opposed to prevailing parties and losing parties? And what limitations are there on private rights of action in such federal-state partnership programs as the WIC Program (dealt with in this case)? Although this Court has addressed some aspects of each of these issues, there remain significant questions as to which further clarification from this court appears to be necessary, as witnessed by the variances in decisions from lower federal courts, including the federal courts involved in the present cause. The questions here are:

(1) Whether the Special Supplemental Food Program (WIC) is a statute that creates rights and obligations in favor of potential participants against states that elect to participate?

(2) Whether a civil rights plaintiff who brings an action against both the federal and a State government, and who clearly prevails against the federal defendant, may be awarded attorney's fees against the State, even where the state had done no wrong to the plaintiff?

(3) Whether the Special Supplemental Food Program (WIC), which is a fully federally funded program, creates a private right of action against a State that elects to participate?

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The Secretary of the New Mexico Health and Environment Department petitions for a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit in this cause.

OPINIONS BELOW

None of the opinions below in this matter have been reported. The Memorandum Opinion and the Declaratory Judgment and Order of the United States District Court for the District of New Mexico appear in the Appendix volume as Appendices F and G. The attorney's fees award Order of the United States District Court for the District of New Mexico, entered October 12, 1978, appears as Appendix H. Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, entered April 4, 1979, appears as Appendix I. The subsequent Order of dismissal of the United States District Court for the District of New Mexico, entered June, 5, 1979, appears as Appendix J. The Order affirming the attorneys fees award of the United States District Court for the District of New Mexico, entered July 12, 1979, appears as Appendix K. The second Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit, entered August 3, 1981, which is sought to be reviewed here, appears as Appendix L.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Tenth Circuit was entered on August 3, 1981. By Order of October 22, 1981, Justice White extended the time within which to file a Petition for a Writ of Certiorari to and including December 16, 1981 (Appendix M). The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The decision in this matter rested entirely on 42 USC §1786, the Special Supplemental Food Program (The WIC Statute). Three versions of the Statute appear in the Appendix: Appendix

(A)1 is the version that was in effect May 28, 1975, at approximately the time at which the first three WIC Programs were started in New Mexico. Appendix A(2) is the version that came into effect October 7, 1975, and which was in effect at the time this lawsuit was filed on November 4, 1976. Appendix A(3) is the version that came into effect on November 10, 1978, and was the version on which the first Opinion and Judgment of the Tenth Circuit Court of Appeals was based, on April 4, 1979.

STATEMENT OF THE CASE

This case arises under the Civil Rights Attorney's Fee Awards Act of 1976, 42 USC §1988, and the Special Supplemental Food Program for Women, Infants and Children (WIC), 42 USC §1786 [P.L. 92-433, P.L. 94-105, and P.L. 95-627].

In July 1974, more than two years before suit was filed, New Mexico had established three WIC programs through private health clinics. The funds for the three sites were made available by the Secretary of Agriculture under demonstration grants authorized by Congress in the initial version of the WIC Statute (Appendix A(1), at pages 1-4). The program sites were established in Bernalillo County, where half the State's population lives, and in the checkerboard area of northwest New Mexico, where large numbers of indigent Hispanics and Native Americans live. Under P.L. 92-433 and the Agriculture Secretary's requirements, the State insured proper medical evaluation of program applicants, recordkeeping at the clinic sites, and fiscal accountability by participating grocery outlets that stocked the supplemental foods prescribed by clinic personnel. Small incremental increases in funding levels permitted modest expansion of the patient case load during the initial period of the program at the three original contract clinics.

With the October 5, 1975, amendments to the WIC statute (Appendix A(2), at pages 5-11), Congress enlarged the authorized funding levels and elaborated on the health maintenance and morbidity prevention objectives of the Agriculture Secretary's program efforts. The amendments also provided for establishment of new programs in areas determined to be "most in need" according to regulations to be promulgated by the Secretary of

Agriculture, which would take into account statistics on miscarriage, abortion, anemia, low birth weight, and slow mental or physical development. New Mexico had those statistics and submitted them with its Affirmative Action Plan for WIC Program expansion to the Secretary. The State expansion plan was approved by the Secretary. However, the State was not awarded the increased grants that were necessary for WIC Program expansion.

Suit was filed in the District Court on November 4, 1976, against the U.S. Secretary of Agriculture and various New Mexico government officials on behalf of certain named individual pregnant or lactating mothers, infants up to the age of one year, children up to the age of five years, and a private organization. The suit was brought to complain that the Secretary of Agriculture and the State defendants were not providing special supplemental foods to eligible women, infants, and children in New Mexico as prescribed in the WIC Statute. The suit sought to require the Secretary of Agriculture to expand WIC Program funding for New Mexico and to require the State government defendants to apply for WIC Program funding sufficient to make available WIC Programs in every county of the State.

As it subsequently came to light, the Secretary had from 1972 through 1975 been impounding some of the monies appropriated by Congress for WIC. On June 22, 1976, the District Court for the District of Columbia ordered the Secretary to stop the unlawful impoundment and to spend the impounded funds, and to devise a method of expenditure consistent with the federal Act. *Durham v. Butz*, _____F. Supp._____ (DCDC No. 76-0358). The Secretary was ordered to provided for disbursing the impounded amounts, together with current appropriations, over the next 27 months, in consultation with the plaintiffs who had brought the action in the District of Columbia. None of the parties to the Petition herein were parties to the litigation in the District of Columbia.

The injunction and continuing jurisdiction of the District Court in *Durham v. Butz, supra*, threw the Secretary of Agriculture's WIC Program nationally into a frenzy. The states, including New Mexico, were suddenly expected to revise and expand their local programs every quarter. From quarter to quarter, it was impossible to know what amount would be

available for WIC Program operations or what maximum patient caseload would be authorized.

Notwithstanding that New Mexico had considerable difficulty with refocusing their effort from quarter to quarter under the Agriculture Secretary's changing requirements, they maintained the State's eligibility to obtain consistently increased funding levels and to expand the WIC Program county by county in New Mexico pursuant to their approved Affirmative Action Plan. By the time of the final Opinion and Declaratory Judgment in the District Court (Appendix J, at pages 46-49), WIC had been established in all counties in which the named plaintiffs resided, save one of them. The program was scheduled to begin in that county within thirty days after the District Court's Order.

The District Court, in its first decision, then, ruled that the Secretary of Agriculture's funding formula for WIC was illegal under the criteria set out at P.L. 94-105 (Appendix F, at page 36). Further, the Court found that New Mexico, in not challenging the Secretary's funding formula and in not applying for funding sufficient for statewide operation, had unlawfully failed to provide rights to which the plaintiffs (Respondents herein) were entitled (Appendix F, at page 38). Upon application of plaintiffs' attorney for fees under 42 USC §1988, the District Court awarded fees against the State of New Mexico (Appendix H, at page 42).

Both the Secretary of Agriculture and the State appealed. While the case was on appeal, Congress made further amendments to the WIC Program [P.L. 95-627] (Appendix A(3), at pages 12-24). The Court of Appeals decided that, since intervening changes in the law had occurred, it should vacate the District Court's order and attorney's fees award and remand the case to the District Court for a determination of what effect the new law might have. On remand, the District Court determined that the intervening amendments had effectively mooted the case. Nevertheless, the District Court reinstated its previous award of civil rights attorney's fees against New Mexico (Appendix J, at pages 46-49). On appeal from that award, the Court of Appeals affirmed (Appendix L, at pages 51-56). It is on that award, and its affirmance, that the Petitioner now seeks *certiorari* in this Court.

REASONS FOR ALLOWING THE WRIT

The first question of consequence here is the rights and obligations a State takes on when it elects to participate in the WIC Program. In New Mexico's case, the District Court decided (Appendix F, at page 38), and the Court of Appeals affirmed (Appendix L, at page 52), that New Mexico had violated the rights of potential program participants by not requesting federal funding sufficient to establish WIC programs throughout the entire state of New Mexico.

It is true that New Mexico had not, at the time this lawsuit was filed, sought federal funding to go statewide with the WIC Program. But the WIC Statute nowhere requires either that the State establish WIC programs statewide or that the Secretary of Agriculture assure statewide operation. The peg on which the District Court hung that requirement is a single sentence appearing in the WIC Statute since October 7, 1975: "The Secretary shall take affirmative action to ensure that programs begin in areas most in need of special supplemental food." (Appendix A(2), at page 7, paragraph (d).) Relying on that sentence, the District Court decided that New Mexico had deprived the Respondents of available federal funds to which they were otherwise "entitled". That is, the District Court found, and the Tenth Circuit Court affirmed, that the Respondents, who were potential participants on the program, were "entitled" to the benefits of the program. Such a conclusion is no more supportable in connection with the WIC Program than it was in connection with the Developmentally Disabled Act (42 USC §1600 et seq.), as found by this Court in *Pennhurst State School v. Halderman*, ____U.S.____, 101 S. Ct.____, 67 L.Ed.2d 694 (1981).

Nowhere in the WIC Statute was New Mexico warned that, if it elected to participate in this federally funded program, potential participants would be clothed with immediate rights against the State, and the State would be obligated to those potential participants. At the time New Mexico elected to participate, there was no language in the Statute, not even a Purpose Clause, that would warn the State it was taking on that sort of obligation (Appendix A(1), at pages 1-4). When a Purpose Clause *was* introduced, by the Act of October 7, 1975, that Clause gave New

Mexico no warning that it was taking on such rights and obligations by continuing to participate (Apendix A(2), at page 5).

In a statute of this kind, enacted pursuant to Congress' Spending Power, the legislation is like a contract: In return for federal funds, the State agrees to comply with federally imposed conditions. But in agreeing, the State must be aware of the contract terms it is voluntarily entering into; that is, Congress must speak clearly, so that the State can exercise its choice with full knowledge of the consequences. *Pennhurst, supra*. In electing to participate in WIC, New Mexico had no way of knowing it was entering into an obligation that could be enforced against it by potential participants.

The WIC Statute, even more than the Developmentally Disabled Act, includes no language that indicates that it is an "entitlement" program. Furthermore, Congress had specifically stated its intent with respect to WIC: When Congress was revising and expanding the program in 1978, the Report of the House Committee on Education and Labor specifically denied Congressional intent to create such rights, saying: "[T]his program is not an open-ended entitlement program but rather is a program subject to regular appropriations under definite authorizations of appropriations." U.S. Code Cong. and Admin. News Digest, 95th Cong., 2d Sess., Vol. 12E, p. 9410.

It is obvious that additional guidance from this Court is desirable in order further to clarify the kinds of federal laws that create enforceable rights and obligations against participating states. Not only do the lower courts need such guidance, the states too should be able to predict the effects of such federal-state contracts they enter into.

(Besides the finding of "entitlement", the District Court added another "finding" (Appendix F, at page 38), repeated by the Tenth Circuit (Appendix L, at page 52), that New Mexico had established its first three WIC Programs without consideration of areas most in need. That "finding" is absolutely true. But it is without legal significance: For when those three programs were started, as noted above in "Statement of the Case", at pages 5 and 6, the Affirmative Action requirement noted above had not yet been added to the statute. That requirement was not added until October 7, 1975.

(Petitioner does not know why the District Court made such

an irrelevant "finding". The Court was not unaware of the true facts: Just a few sentences before this meaningless "finding", the Court had quoted from New Mexico's 27-Month Plan of Action, in which it was clearly stated that the three local agencies had been initiated *before* a requirement for an Affirmative Action Plan had been established! Appendix D, at pages 37-38.)

If, as Petitioner believes, the WIC Statute is similar to the Developmentally Disabled Act in not creating enforceable rights and obligations against the participating state, then New Mexico did not wrong Respondents. That is, Respondents were not a prevailing party as to New Mexico. Respondents did, however, prevail against New Mexico's co-defendant, the Secretary of Agriculture, who the Court found had erred in adopting a funding formula for the distribution of WIC funds. Thus, Respondents were a prevailing party as to the federal defendant. However, since the Secretary is immune from the award of attorney's fees and the District court made no such award against the Secretary, the Secretary did not appeal the District Court's conclusion, repeated when it dismissed the action as moot (Appendix J, at page 48). Thus, as to the overall litigation, the Court found that Respondents were a prevailing party. But the fact is that New Mexico was an innocent party.

Normally, it would seem, the fact that a civil rights defendant is innocent of wrongdoing would free it from the responsibility of paying attorney's fees. Indeed, in the federal District Court in Arkansas, where there were multiple defendants, the court refused to award attorney's fees against one of the organizational defendants because, the Court found, that in no sense had plaintiffs "prevailed" against *that* defendant.[8] "Where, as here, the plaintiffs did not prevail as to one of several defendants, the Attorney's Fees Act would not seem to justify a judgment for fees against that defendant... *Ark. Community Org anization v. Ark. State Bd.*, 468 F Supp. 1254 (ED Ark. 1979)

This case, however, is not the Arkansas case. Here, if the innocent party does not pay attorney's fees, the prevailing party will receive nothing, because the losing federal defendant is immune from the payment of such fees. Thus, in this Court, the significant question is raised which is more unjust: not to reward a prevailing plaintiff or to penalize an innocent defendant. Petitioner thinks the answer to that question is clear, but that it deserves saying by this Court.

Finally, there is the fundamental question of federal jurisdiction in this case, a question touched on in *Pennhurst, supra*, but not answered, whether statutes like the Developmentally Disabled Act and the WIC Statute give potential participants a private right of action. Petitioner believes that, if there is no private right of action under the DD Act, *a fortiori* there is no private right of action under the WIC Statute.

There are marked similarities between the DD Act and the WIC Statute: They are both federal-state grant programs whereby the federal government provides financial assistance to participating states to pay them in caring for disadvantaged individuals. In both, state participation is voluntary, and the states are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding. The purpose of the DD Act is to "assist" and financially "support" activities in connection with the providing of services; the purpose of the WIC program is to "provide" supplemental nutritious food. The DD Act was enacted by Congress pursuant to its Spending Power *(Pennhurst, supra);* it appears unarguable that the WIC Program was similarly enacted by Congress pursuant to its Spending Power under the Welfare Clause. The DD Act, however, contemplates that a state electing to participate will invest state funds in addition to the federal funds received; the WIC Statute envisions no such funding on the part of the State. The DD Act has more elaborate funding sanctions in case the federal administrative agency finds program failures in state administration; both statutes, nevertheless, include funding sanctions to be applied by the appropriate federal administrative agency.

In *Pennhurst, supra*, the court said that the typical remedy for a state failing to comply with the federally imposed conditions is action by the federal agency to terminate funds to the state rather than a private cause of action. Thus, potential participants may be limited to enjoining the federal government to do its duty and limit or cut off funds to the state. Petitioner believes *that* is the appropriate remedy under WIC, that there is no private right of action intended in the statute, and that consequently there was no jurisdiction in the District Court to entertain this action against the state defendants.

It should be noted that the question of jurisdiction was raised

by Petitioner in every stage of this case: It was presented to the District Court initially, after the lawsuit was filed. It was presented to the Court of Appeals in the first appeal. It was presented to the District Court after remand, and it was again brought before the Tenth Circuit on the second appeal. On each occasion, each Court summarily found that it *had* jurisdiction. The question of subject matter jurisdiction is not one being advanced in this Court for the first time.

Although the question of private right of action was treated summarily in the Courts below in this matter, the same question for the DD Act was given detailed attention in *Garrity v. Gallen*, 50 Law Week 2149 (NH 8/17/81). In that case, the District Court made an exhaustive analysis of the rights of the plaintiffs. In doing so it relied on this Court's opinions in *Maine v. Thiboutot*, 448 US 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980); *Pennhurst, supra; Middlesex Cty. Sewerage Auth. v. Sea Clammers*, ____U.S.____ 101 S.Ct.____, 69 L.Ed.2nd 435 (1981); and *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 2d 26 (1975). That Court found that, while the plaintiffs belonged to the class for whose "especial" benefit the statute was enacted, that it was the Secretary's statutory duties that the plaintiffs there could compel in private action. That is, the limited private right of action is one against the Secretary, and not against the state or its employees pursuant to §1983. The Court concluded that, since §1983 is not available when the governing statute provides an exclusive remedy for its violation, which is the case with the DD Act, the plaintiffs were precluded from proceeding with their §1983 suit against the various state officials and agencies.

The parallels previously drawn between the DD Act and the WIC Statute (and with the latter even less a "rights" statute than the former) make it clear that, if there is no private right of action in the DD Act, there is no private right of action in the WIC Statute.

CONCLUSION

The questions of damages under §1983, attorney's fees under §1988, and the Congressional intent regarding private right of action are inextricably bound together. And, although this Court has previosly addressed those questions, it is quite evident that reconsideration, by allowing the Writ in this matter, is desirable.

Respectfully submitted,

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Appendix

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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42 USC §*1786. Special Supplemental Food Program.*

(a) Cash grants.

During each of the fiscal years ending June 30, 1973, June 30, 1974, and June 30, 1975, and for the period July 1, 1975, through September 30, 1975, the Secretary shall make cash grants to the health department or comparable agency of each State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare for the purpose of providing funds to local health or welfare agencies or private nonprofit agencies of such State; Indian tribe; Band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare serving local health or welfare needs to enable such agencies to carry out a program, under which supplemental foods will be made available to pregnant or lactating women and to infants determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income. Such program shall be operated for a three-year period and may be carried out in any area of the United States without regard to whether a food stamp program or a direct food distribution program is in effect in such area.

(b) Authorization of appropriations.

In order to carry out the program provided for under subsection (a) of this section during the fiscal year ending June 30, 1973, the Secretary shall use $20,000,000 out of funds appropriated by section 32 of the Act of August 24, 1935 (7 U.S.C. 612(c)). In order to carry out such program during the fiscal year ending June 30, 1974, there is authorized to be appropriated the sum of $20,000,000, but in the event that such sum has not been appropriated for such purpose by August 1, 1973, the Secretary shall use $20,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount

directly appropriated for such purpose and $20,000,000, out of funds appropriated by Section 32 of the Act of August 24, 1935 (7 U.S.C. 612(c)). In order to carry out such program during the fiscal year ending June 30, 1975, and for the period July 1, 1975, through September 30, 1975, there is authorized to be appropriated the sum of $100,000,000, but in the event that such sum has not been appropriated for such purpose by August 1, 1974, the Secretary shall use $100,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $100,000,000, out of funds appropriated by section 32 of the Act of August 24, 1935 (7 U.S.C. 612(c)). Any funds expended from such section 32 [7 USCS § 612c] to carry out the provisions of subsection (a) of this section shall be reimbursed out of any supplemental appropriation hereafter enacted for the purpose of carrying out the provisions of such subsection, and such reimbursements shall be deposited into the fund established pursuant to such section 32 [7 USCA § 612c], to be available for the purpose of such section.

(c) Administrative costs.

Whenever any program is carried out by the Secretary under authority of this section through any State or local or nonprofit agency, he is authorized to pay administrative costs not to exceed 10 per centum of the Federal funds provided under the authority of this section.

(d) Determination of eligibility.

The eligibility of persons to participate in the program provided for under subsection (a) of this section shall be determined by competent professional authority. Participants shall be residents of areas served by clinics or other health facilities determined to have significant numbers of infants and pregnant and lactating women at nutritional risk.

(e) Medical records.

State or local agencies or groups carrying out any program under this section shall maintain adequate medical records on the participants assisted to enable the Secretary to deter-

mine and evaluate the benefits of the nutritional assistance provided under this section. The Secretary and Comptroller General of the United States shall submit preliminary evaluation reports to the Congress not later than October 1, 1974; and not later than March 30, 1975, submit reports containing an evaluation of the program provided under this section and making recommendations with regard to its continuation.

(f) Definitions.

As used in this section —

(1) "Pregnant and lactating women" when used in connection with the term at "nutrition risk" includes mothers from low-income populations who demonstrate one or more of the following characteristics: known inadequate nutritional patterns, unacceptably high incidence of anemia, high prematurity rates, or inadequate patterns of growth (underweight, obesity, or stunting). Such term (when used in connection with the term "at nutritional risk") also includes low-income individuals who have a history of high-risk pregnancy as evidenced by abortion, premature birth or severe anemia.

(2) "Infants" when used in connection with the term "at nutritional risk" means children under four years of age who are in low-income populations which have shown a deficient pattern of growth, by minimally acceptable standards, as reflected by an excess number of children in the lower percentiles of height and weight. Such term, when used in connection with "at nutritional risk", may also include (at the discretion of the Secretary) children under four years of age who (A) are in the parameter of nutritional anemia, or (B) are from low-income populations where nutritional studies have shown inadequate infant diets.

(3) "Supplemental foods" shall mean those foods containing nutrients known to be lacking in the diets of populations at nutritional risks and, in particular, those foods and food products containing high-quality protein, iron, calcium, vitamin A, and vitamin C. Such term

may also include (at the discretion of the Secretary) any food product commercially formulated preparation specifically designed for infants.

(4) "Competent professional authority" includes physicians, nutritionists, registered nurses, dieticians, or State or local medically trained health officials, or persons designated by physicians or State or local medically trained health officials as being competent professionally to evalutate nutritional risk.

42 USC §1786. Special Supplemental Food Program.

(a) Congressional purpose.

The Congress finds that substantial numbers of pregnant women, infants, and young children are at special risk in respect to their physical and mental health by reason of poor or inadequate nutrition or health care, or both. It is, therefore, the purpose of the program authorized by this section to provide supplemental nutritious food as an adjunct to good health care during such critical times of growth and develpment in order to prevent the occurrence of health problems.

(b) Cash grants.

(1) During the fiscal year ending June 30, 1976, the period July 1, 1976, through September 30, 1976, the fiscal year ending September 30, 1977, and the fiscal year ending September 30, 1978, the Secretary shall make cash grants to the health department or comparable agency of each State, Indian tribe, band or group recognized by the Department of the Interior, or the Indian Health Service of the Department of Health, Education, and Welfare for the purpose of providing funds to local health or welfare agencies or private nonprofit agencies of such State; Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare, serving local health or welfare needs to enable such agencies to carry out health and nutrition programs under which supplemental foods will be made available to pregnant or lactating women and to infants determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income, in order to improve their health status. The program authorized by this section shall be carried out supplementary to the food stamp and food distribution program and operate side by side with existing supplemental food programs.

(2) Any eligible local health or welfare agency or private nonprofit agency that applies to operate such a supplemental food program immediately shall be provided with the necessary funds to carry out the program. The requirements set forth herein shall not be construed to permit the Secretary to reduce ratably the amount of foods that an eligible health or welfare agency shall distribute under the program to pregnant or lactating mothers and infants.

(c) Appropriation authorization — reimbursement.

In order to carry out such program during each fiscal year during the period ending September 30, 1977, there is authorized to be appropriated the sum of $250,000,000, but in the event that such sum has not been appropriated for such purpose by the beginning of each fiscal year, the Secretary shall use $250,000,000, or, if any amount has been appropriated for such program, the difference, if any, between the amount directly appropriated for such purpose and $250,000,000, out of funds appropriated by Section 32 of the Act of August 24, 1937 (7 U.S.C. 612c). Any funds expended from such section 32 to carry out the provisions of this section shall be reimbursed out of any supplemental appropriation hereafter enacted for the purpose of carrying out the provisions of such subsection, and such reimbursements shall be deposited into the fund established pursuant to such section 32 to be available for the purpose of such section. In order to carry out the program during the fiscal year ending September 30, 1978, there is authorized to be appropriated not to exceed $250,000,000.

(d) Administrative costs.

Whenever any program is carried out by the Secretary under authority of this section through any State or local or nonprofit agency, he is authorized to pay administrative costs not to exceed 20 per centum of the program funds provided to each State under the authority of this section. Each health department or com-

parable agency of each State, Indian tribe, band, or group recognized by the Department of the Interior; or the Indian Health Service of the Department of Health, Education, and Welfare receiving funds from the Secretary under this section shall, each year by not later than a date specified by the Secretary, for approval by the Secretary as a prerequisite to receipt of funds under this section, submit a description of the manner in which administrative funds shall be spent, including, but not limited to, a description of the manner in which nutrition education services will be provided. The Secretary shall take affirmative action to insure that programs begin in areas most in need of special supplemental food. During the first 3 months of any program, or until the program reaches its projected caseload level, whichever comes first, the Secretary shall pay those administrative costs necessary to commence the program successfully.

(e) Participants.

The eligibility of persons to participate in the program provided for under this section shall be determined by competent professional authority. Participants shall be residents of areas or members of populations served by clinics or other health facilities determined to have significant numbers of infants and pregnant and lactating women at nutritional risk.

(f) Advisory committee — Report — Recommendations — submittal to Congress

State or local agencies or groups carrying out any programs under this section shall maintain adequate medical records on the participants assisted to enable the Secretary to determine and evaluate the benefits of the nutritional assistance provided under this section. The Secretary shall convene an advisory committee made up of representatives from the Maternal and Child Health Division of the Department of Health, Education, and Welfare, the Center for Disease Control, the Association of State and Territorial Public Health Nutrition Directors, the American Academy of Pediatrics, the Na-

tional Academy of Science — National Research Council, the American Dietetic Association, the American Public Health Association, the Public Health Service, and others as the Secretary deems appropriate. The committee shall study the methods available to evaluate successfully and economically, in part or in total, the health benefits of the special supplemental food program. The committee's study shall consider the usefulness of the medical data collected and the methodoligy used by the Department of Agriculture and the Comptroller General of the United States prior to March 30, 1975. The study shall also include the applicability to an evaluation of the special supplemental food program of other Federal and State health, welfare, and nutrition assessment and surveillance projects currently being conducted. The purpose of the advisory committee shall be to determine and recommend in detail how, using accepted scientific methods, the health benefits of the special supplemental food program may best be evaluated and assessed. The advisory committee shall report its study to the Secretary no later than March 1, 1976. The Secretary shall submit to Congress his recommendations based on such study no later than June 1, 1976.

(g) Definitions. As used in this section —

(1) 'Pregnant and lactating women' when used in connection with the term 'at nutritional risk' includes women from low-income populations who demonstrate one or more of the following characteristics: known inadequate nutritional patterns, unacceptably high incidence of anemia, high prematurity rates, or inadequate patterns of growth (underweight, obesity, or stunting). Such term (when used in connection with the term 'at nutritional risk') also includes low-income individuals who have a history of high-risk pregnancy as evidenced by abortion, premature birth, or severe anemia. Such lactating women shall include women who are breast feeding an infant from birth up to one year of age and also all women for a period of six months post partum.

(2) 'Infants' when used in connection with the term 'at nutritional risk' means children under 5 years of age who are in low-income populations which have shown a deficient pattern of growth, by minimally acceptable standards, as reflected by an excess number of children in the lower percentiles of height and weight. Such term, when used in connection with 'at nutritional risk', may also include children under 5 years of age who (A) are in the parameter of nutritional anemia, or (B) are from low-income populations where nutritional studies have shown inadequate infant diets.

(3) 'Supplemental foods' shall mean those foods containing nutrients known to be lacking in the diets of populations at nutritional risk and, in particular, those foods and food products containing high quality protein, iron, calcium, vitamin A, and vitamin C. Such term may also include (at the discretion of the Secretary) any commercially formulated preparation specifically designed for women or infants. The contents of the food package shall be made available in such a manner as to provide flexibility, taking into account medical and nutritional objectives and cultural eating patterns.

(4) 'Competent professional authority' includes physicians, nutritionists, registered nurses, dietitians, or State or local medically trained health officials, or persons designated by physicians or State or local medically trained health officials as being competent profesionally to evaluate nutritional risk.

(5) 'Administrative costs' include costs for referral, operation, monitoring, nutrition education, general administration, startup clinic, and administration of the State office.

(h) National Advisory Council on Maternal, Infant, and Fetal Nutrition — Establishment.

(1) There is hereby established a council to be known as the National Advisory Council on Maternal, Infant, and Fetal Nutrition (hereinafter in this section referred to as the 'Council') which shall be composed of 15 members appointed by the Secretary. One member shall be a State

director of the special supplemental food program (or the equivalent thereof), 1 member a State health officer (or equivalent thereof), 1 member shall be a project director of a special supplemental food program in an urban area, 1 member shall be a project director of a special supplemental food program in a rural area, 1 member shall be a State public health nutrition director (or equivalent thereof), 2 members shall be parent recipients of the special supplemental food program, 1 member shall be a pediatrician, 1 member shall be an obstetrician, 1 member shall be a person involved at the retail sales level of food in the special supplemental food program, 2 members shall be officers or employees of the Department of Health, Education, and Welfare, specially qualified to serve on the Council because of their education, training, experience, and knowledge in matters relating to maternal, infant and fetal nutrition, and 2 members shall be officers or employees of the Department of Agriculture, specially qualified because of their education, training, experience, and knowledge in matters relating to maternal, infant, and fetal nutrition.

(2) The 11 members of the Council appointed from outside the Department of Agriculture and the Department of Health, Education, and Welfare shall be appointed for terms of 3 years, except that the 9 members first appointed to the Council shall be appointed as follows: Three members shall be appointed for terms of 3 years, 3 members shall be appointed for terms of 2 years, and 3 members shall be appointed for terms of 1 year. Thereafter all appointments shall be for a term of 3 years, except that a person appointed to fill an unexpired term shall serve only for the remainder of such term. Members appointed from the Department of Agriculture and the Department of Health, Education, and Welfare, shall serve at the pleasure of the Secretary.

(3) The Secretary shall designate one of the members to serve as Chairman and one to serve as Vice Chairman of the Council.

(4) The Council shall meet at the call of the Chairman but shall meet at least once a year.
(5) Eight members shall constitute a quorum and a vacancy on the Council shall not affect its powers.
(6) It shall be the function of the Council to make a continuing study of the operation of the special supplemental food program and any related Act under which diet supplementation is provided to women, infants, and children, with a view to determining how such programs may be improved. The Council shall submit to the President and the Congress annually a written report of the results of its study together with such recommendations for administrative and legislative changes as it deems appropriate.
(7) The Secretary shall provide the Council with such technical and other assistance, including secretarial and clerical assistance, as may be required to carry out its functions under this act.
(8) Members of the Council shall serve without compensation but shall receive reimbursement for necessary travel and subsistence expenses incurred by them in the performance of the duties of the Council."

42 USCS § 1786 **Special supplemental food program**

(a) Congressional purpose. Congress finds that substantial numbers of pregnant, postpartum and breastfeeding women, infants, and young children from families with inadequate income are at special risk with respect to their physical and mental health by reason of inadequate nutrition or health care, or both. It is, therefore, the purpose of the program authorized by this section to provide, up to the authorization levels set forth in subsection (g) of this section, supplemental foods and nutrition education through any eligible local agency that applies for participation in the program. The program shall serve as an adjunct to good health care, during critical times of growth and development, to prevent the occurrence of health problems and improve the health status of these persons.

(b) Definitions. As used in this section —

(1) "Administrative costs" means costs that shall include, but not be limited to, costs for certification of eligibility of persons for participation in the program; centrifuges, measuring boards, spectrophotometers, and scales used for such certification; food delivery; monitoring; nutrition education; outreach; start-up costs; and general administration applicable to implementation of the program under this section, such as the cost of staff, warehouse facilities, transportation, insurance, developing and printing food instruments, and administration of State and local agency offices.

(2) "Breastfeeding women" means women up to one year postpartum who are breastfeeding their infants.

(3) "Children" means persons who have had their first birthday but have not yet attained their fifth birthday.

(4) "Competent professional authority" means physicians, nutritionists, registered nurses, dietitians, or State or local medically trained health officials, or persons designated by physicians or State or local medically trained health officials, in accordance with standards prescribed by the Secretary, as being competent professionally to evaluate nutritional risk.

(5) "Infants" means persons under one year of age.
(6) "Local agency" means a public health or welfare agency or a private nonprofit health or welfare agency, which, directly or through an agency or physician with which it has contracted, provides health services. The term shall include an Indian tribe, band, or group recognized by the Department of the Interior, the Indian Health Service of the Department of Health, Education, and Welfare, or an intertribal council or group that is an authorized representative of Indian tribes, bands, or groups recognized by the Department of the Interior.
(7) "Nutrition education" means individual or group sessions and the provision of materials designed to improve health status that achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.
(8) "Nutritional risk" means (A) detrimental or abnormal nutritional conditions detectable by biochemical or anthropometric measurements, (B) other documented nutritionally related medical conditions, (C) dietary deficiencies that impair or endanger health, or (D) conditions that predispose persons to inadequate nutritional patterns or nutritionally related medical conditions, including, but not limited to, alcoholism and drug addiction.
(9) "Plan of operation and administration" means a document that describes the manner in which the State agency intends to implement and operate the program.
(10) "Postpartum women" means women up to six months after termination of pregnancy.
(11) "Pregnant women" means women determined to have one or more fetuses in utero.
(12) "Secretary" means the Secretary of Agriculture.
(13) "State agency" means the health department or comparable agency of each State; an Indian tribe, band, or group recognized by the Department of the Interior; an intertribal council or group that is the authorized representative of Indian tribes, bands, or groups recognized by the Department of the Interior; or the Indian Health Service of

the Department of Health, Education, and Welfare.

(14) "Supplemental foods" means those foods containing nutrients determined by nutritional research to be lacking in the diets of pregnant, breastfeeding, and postpartum women, infants, and children, as prescribed by the Secretary. State Agencies may, with the approval of the Secretary, substitute different foods providing the nutritional equivalent of foods prescribed by the Secretary, to allow for different cultural eating patterns.

(c) Responsibilities of Secretary.

(1) The Secretary may carry out a special supplemental food program to assist State agencies through grants-in-aid and other means to provide, through local agencies, at no cost, supplemental foods, and nutrition eduction to low-income pregnant, postpartum, and breastfeeding women, infants, and children who satisfy the eligibility requirements specified in subsection (d) of this section. The program shall be supplementary to the food stamp program (91 Stat. 958) and to any program under which foods are distributed to needy families in liew of food stamps.

(2) Subject to the authorization levels specified in subsection (g) of this section for the fiscal years ending September 30, 1979, and September 30, 1980, and subject to amounts appropriated for this program for the fiscal year ending September 30, 1981, and for each succeeding fiscal year ending on or before September 30, 1984 —

(A) the Secretary shall make cash grants to State agencies for the purpose of administering the program, and

(B) any State agency approved eligible local agency that applies to participate in or ex and the program under this section shall immediately be provided with the necessary funds to carry out the program.

(3) Nothing in this subsection shall be construed to permit the Secretary to reduce ratably the amount of foods that an eligible local agency shall distribute under the program to participants. The Secretary shall take affirmative action to ensure that the program is instituted in areas most in need of supplemental foods. The existance of a commodity sup-

plemental food program under section 1304 of the Food and Agriculture Act of 1977 [7 USCS § 612c note] shall not preclude the approval of an application from an eligible local agency to participate in the program under this section nor the operation of such program with the same geographic area as that of the commodity supplemental food program, but the Secretary shall issue such regulations as are necessary to prevent dual receipt of benefits under the commodity supplemental food program and the program under this section.

(d) Program participation.

(1) Participation in the program under this section shall be limited to pregnant, postpartum, and breastfeeding women, infants, and children from low-income families who are determined by a competent professional authority to be at nutritional risk.

(2) The Secretary shall establish income eligibility standards to be used in conjunction with the nutritional risk criteria in determining eligibility of persons for participation in the program. Persons at nutritional risk shall be eligible for the program only if they are members of families that satisfy the income standards prescribed for free and reduced-price school meals under section 9 of the National School Lunch Act [42 USCS § 1758].

(3) Persons shall be certified for participation in accordance with general procedures prescribed by the Secretary.

(e) Nutrition education.

(1) The State agency shall ensure that nutrition education is provided to all pregnant, postpartum, and breastfeeding participants in the program and to parents or caretakers of infant and child participants in the program. The State agency may also provide nutrition education to pregnant, postpartum, and breastfeeding women and to parents or caretakers of infants and children enrolled at local agencies operating the program under this section who do not participate in the program. The Secretary shall prescribe standards to ensure that adequate nutrition education services are provided. The State agency shall provide training to persons providing nutrition education under this section.

Nutrition education shall be evaluated annually by each State agency, and such evaluation shall include the views of participants concerning the effectiveness of the nutrition education they have received.

(2) The Secretary shall, after submitting proposed nutrition education materials to the Secretary of Health, Education, and Welfare for comment, issue such materials for use in the program under this section.

(f) State operation and administrative plan, submitted to Secretary of Agriculture.

(1) Each State agency shall submit annually to the Secretary, by a date specified by the Secretary, a plan of operation and administration for approval by the Secretary as a prerequisite to receiving funds under this section. The plan shall include, among such other information as the Secretary may require —

(A) a description of how the State agency will distribute administrative funds, including start-up funds, to local agencies operating under the program;

(B) a description of the State agency's financial management system;

(C) a description of methods used to determine nutritional risk;

(D) a budget for administrative funds;

(E) the staffing pattern;

(F) nutrition education goals and action plans, including a description of the methods that will be used to meet the special nutrition education needs of migrants and Indians;

(G) plans to provide program benefits under this section to eligible migrants and Indians;

(H) a list of all areas and special populations, in priority order based on relative need, within the jurisdiction of the State agency, and the State agency's plans to initiate or expand operations under the program in areas most in need of supplemental foods, including plans to inform nonparticipating local agencies of the availability and benefits of the program, and the availability of technical assistance in implementing the program, and a descrip-

tion of how the State agency will take all reasonable actions to identify potential local agencies and encourage such agencies to implement or expand operations under the program within the following year in the neediest one-third of all areas unserved or partially served;

(I) a description of how the State agency's delivery system will enable low-income persons to receive supplemental foods under this program, in accordance with standards developed by the Secretary;

(J) the State agency's plans for informing eligible persons of the program under this section in accordance with paragraph (8) of this subsection;

(K) a description of how the State agency plans to coordinate operations under the program with special counseling services such as, but not limited to, the expanded food and nutrition education program, family planning, immunization, prenatal care, well-child care, alcohol and drug abuse counseling, child abuse counseling, and with the food stamp program; and

(L) a copy of the procedure manual developed by the State agency for the program under this section.

(1) The Secretary shall not approve any plan that permits any person to participate simultaneously in both the program authorized under this section and the commodity supplemental food program under section 1304 of the Food and Agriculture Act of 1977 [7 USCS § 612c note].

(2) Not less than one month prior to the submission to the Governor of the plan of operation and administration required by this subsection, the State agency shall conduct hearings to enable the general public to participate in the development of the State agency plan.

(3) The Secretary shall establish procedures under which eligible migrants may, to the maximum extent feasible, continue to participate in the program under this section when they are present in States other than the State in which they were originally certified for participation in the program. Each State agency shall be responsible for administering the program for migrant populations within its jurisdiction.

(4) State agencies shall submit monthly financial reports and participation data to the Secretary.

(5) State and local agencies operating under the program shall keep such accounts and records, including medical records, as may be necessary to enable the Secretary to determine whether there has been compliance with this section and to determine and evaluate the benefits of the nutritional assistance provided under this section. Such accounts and records shall at all times be available for inspection and audit by representatives of the Secretary and shall be preserved for such period of time, not in excess of five years, as the Secretary determines necessary.

(6) The State agency, upon receipt of a completed application from a local agency for participation in the program (and the Secretary, upon receipt of a completed application from a State agency), shall notify the applicant agency in writing within thirty days of the approval or disapproval of the application, and any disapproval shall be accompanied with a statement of the reasons for such disapproval. Within fifteen days after receipt of an incomplete application, the State agency (or the Secretary) shall notify the applicant agency of the additional information needed to complete the application.

(7) Local agencies participating in the program under this section shall notify persons of their eligibility or ineligibility for the program within twenty days of the date that the household, during office hours of a local agency, personally makes an oral or written request to participate in the program. The Secretary shall establish a shorter notification period for categories of persons who, due to special nutritional risk conditions, must receive benefits more expeditiously.

(8) The State agency shall, in cooperation with participating local agencies, publicize the availability of program benefits, including the eligibility criteria for participation and the location of local agencies operating the program. Such information shall be publicly announced by the State agency and by local agencies at least annually. Such information shall also be distributed to offices and

organizations that deal with significant numbers of potentially eligible persons, including health and medical organizations, hospitals and clinics, welfare and unemployment offices, social service agencies, farmworker organizations, Indian tribal organizations, and religious and community organizations in low income areas.

(9) The State agency shall grant a fair hearing, and a prompt determination thereafter, in accordance with regulations issued by the Secretary, to any applicant, participant, or local agency aggrieved by the action of a State or local agency as it affects participation.

(10) If a person certified as eligible for participation in the program under this section in one area moves to another area in which the program is operating, that person's certification of eligibility shall remain valid for the period for which the person was originally certified.

(11) The Secretary, shall establish standards for the proper, efficient, and effective administration of the program, including standards that will ensure sufficient State agency staff. If the Secretary determines that a State agency has failed without good cause to administer the program in a manner consistent with this section or to implement the approved plan of operation and administration under this subsection, the Secretary may withhold such amounts of the State agency's administrative funds as the Secretrary deems appropriate. Upon correction of such failure during a fiscal year by a State agency, any funds so withheld for such fiscal year shall be provided the State agency.

(12) The Secretary shall prescribe by regulation the supplemental foods to be made available in the program under this section. To the degree possible, the Secretary shall assure that the fat, sugar, and salt content of the prescribed foods is appropriate. Products specifically designed for pregnant, postpartum, and breastfeeding women, or infants shall be available at the discretion of the Secretary if the products are commercially available or are justified to and approved by the Secretary based on clinical tests performed in accordance with standards prescribed by the Secretary.

(13) A competent professional authority shall be responsible for prescribing the appropriate supplemental foods, taking into account medical and nutritional conditions and cultural eating patterns.

(14) The State agency shall (A) provide nutrition education materials and instruction in languages other than English and (B) use appropriate foreign language materials in the administration of the program, in areas in which a substantial number of low-income households speak a language other than English.

(g) Appropriation authorization.

There are hereby authorized to be appropriated $550,000,000 for the fiscal year ending September 30, 1979, $750,000,000 for the fiscal year ending September 30, 1980, $900,000,000 for the fiscal year ending September 30, 1981, and such sums as may be necessary for the three subsequent fiscal years, for the purpose of carrying out the program authorized by this section. Of the sums appropriated for any fiscal year for the program under this section, one-half of 1 percent, not to exceed $3,000,000, shall be available to the Secretary for the purpose of evaluating program performance, evaluating health benefits, and administration of pilot projects, including projects designed to meet the special needs of migrants, Indians, and rural populations.

(h) Administrative funds, allocation.

(1) The Secretary shall make 20 percent of the funds provided under this section each fiscal year (other than funds expended for evaluation and pilot projects under subsection (g) of this section) available for State agency and local agency administrative costs. When reallocating funds, the Secretary may exceed the 20 percent limitation for administrative costs if the Secretary determines such action necessary for the proper, efficient, and effective administration of the program. Not less than one-sixth of the funds expended by each State agency for administrative costs under this subsection shall be used for nutrition education activities, unless the State agency requests that it be authorized to expend a lesser amount and such request is

accompanied by documentation that other funds will be used to conduct such activities.

(2) The Secretary, for each of the fiscal years 1979 through 1984, shall allocate administrative funds to each State agency on the basis of a formula determined by the Secretary, which shall include a minimum amount, and which shall be designed to take into account the varying needs of State agencies based on factors such as the number of local agencies and the number of persons participating in the program at those agencies.

(3) Each State agency shall provide, from its allocation for administrative funds, funds to local agencies for their administrative costs. Each State agency shall distribute administrative funds to local agencies under allocation standards developed by the State agency in cooperation with the several local agencies, which satisfy allocation guidelines established by the Secretary. Such allocation standards shall take into account factors deemed apropriate to further proper, efficient and effective administration of the program, such as local agency staffing needs, density of population, number of persons served, and availability of administrative support from other sources. These allocation standards shall be included in the plan of operation and administration required by subsection (f) of this section.

(4) The State agency shall forward in advance to local agencies those administrative funds necessary for successful commencement of program operations under this section during the three months following approval or until a program reaches its projected caseload level, whichever comes first.

(i) Allocation of funds to State agencies.

By the beginning of each fiscal year, the Secretary shall divide, among the State agencies, the funds provided in accordance with this section on the basis of a formula determined by the Secretary. Each State agency's allocation, as so determined, shall constitute the State agency's authorized operational level for that year, except that the Secretary shall reallocate funds periodically if the Secretary deter-

mines that a State agency is unable to spend its allocation. For purposes of the formula, if Indians, are served by the health department of a State, the formula shall be based on the State population inclusive of the Indians within the State boundaries. If Indians residing in the state are served by a State agency other than the health department of the State, the population of the tribes within the jurisdiction of the State being so served shall not be included in the formula for such State, and shall instead be included in the formula for the State agency serving the Indians. Notwithstanding any other provision of this section, the Secretary may use a portion of a State agency's allocation to purchase supplemental foods for donation to the State agency under this section.

(j) Report of Secretary.

By October 1 of each year, the Secretary shall prepare a report describing plans to ensure that, to the maximum extent feasible, eligible members of migrant populations continue to participate in the program as such persons move among States. The report shall be made available to the National Advisory Council on Maternal, Infant, and Fetal Nutrition.

(k) National Advisory Council on Maternal, Infant, and Fetal Nutrition; establishment; membership.

(1) There is hereby established a National Advisory Council on Maternal, Infant, and Fetal Nutrition (referred to in this subsection as the 'Council') composed of twenty-one members appointed by the Secretary. One member shall be a State director of a program under this section; one member shall be a State official responsible for a commodity supplemental food program under section 1304 of the Food and Agriculture Act of 1977 [7 USCS § 612c note]; one member shall be a State fiscal officer of a program under this section (or the equivalent thereof); one member shall be a State health officer (or the equivalent thereof); one member shall be a local agency director of a program under this section in an urban area; one member shall be a local agency director of a program under this section in a rural area; one member shall be a project director

of a commodity supplemental food program; one member shall be a State public health nutrition director (or the equivalent thereof); one member shall be a representative of an organization serving migrants; one member shall be an official from a State agency predominantly serving Indians; three members shall be parent participants of a program under this section or of a commodity supplemental food program; one member shall be a pediatrician; one member shall be an obstetrician; one member shall be a representative of a nonprofit public interest organization that has experience with and knowledge of the special supplemental food program; one member shall be a person involved at the retail sales level of food in the special supplemental food program; two members shall be officials of the Department of Health, Education, and Welfare appointed by the Secretary of Health, Education, and Welfare; and two members shall be officials of the Department of Agriculture appointed by the Secretary.

(2) Members of the Council appointed from outside the Department of Agriculture and the Department of Health, Education, and Welfare shall be appointed for terms not exceeding three years. State and local officials shall serve only during their official tenure, and the tenure of parent participants shall not exceed two years. Persons appointed to complete an unexpired term shall serve only for the remainder of such term.

(3) The Secretary shall designate a Chairman and a Vice Chairman. The council shall meet at the call of the Chairman, but shall meet at least once a year. Eleven members shall constitute a quorum.

(4) The Council shall make a continuing study of the operation of the program under this section and related programs to determine how the program may be improved. The Council shall submit once every two years to the President and Congress, beginning with the fiscal year ending September 30, 1980, a written report, together with its recommendations on such program operations.

(5) The Secretary shall provide the Council with such

technical and other assistance, including secretarial and clerical assistance, as may be required to carry out its functions.

(6) Members of the Council shall serve without compensation but shall be reimbursed for necessary travel and subsistence expenses incurred by them in the performance of the duties of the Council. Parent participant members of the Council, in addition to reimbursement for necessary travel and subsistence, shall, at the discretion of the Secretary, be compensated in advance for other personal expenses related to participation on the Council, such as child care expenses and lost wages during scheduled Council meetings.

(l) Donations.

Foods available under section 416 of the Agriculture Act of 1949 [7 USCS § 1431], including, but not limited to, dry milk, or purchased under section 32 of the Act of August 24, 1935 [7USCS § 612c], may be donated by the Secretary, at the request of a State agency, for distribution to programs conducted under this section. The Secretary may purchase and distribute, at the request of a State agency, supplemental foods for donation to programs conducted under this section, with appropriated funds, including funds appropriated under this section.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, BRENDA YTURRALDE, DEBBIE CASAUS, ARCELIA PEYTON, BERNICE MARTINEZ, PAULINE McDANIELS, MARY ANN CHAVEZ, JESSIE GOMEZ, ANA BENAVIDEZ, MARIA GOMEZ, LEONA VASQUES, JOAN McCUTCHEON, DOROTHY PARKER, DOLORES MARTINEZ, CELINA SAAVEDRA, RUTHIE WARE, LUCINDA WARE, NEW MEXICO COUNCIL ON FOOD AND NUTRITION, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

No. 76-629-M Civil

ROBERT BERGLAND, Secretary of Agriculture

Defendant,

and

HEALTH AND ENVIRONMENT DEPARTMENT OF NEW MEXICO, MAXINE GERHARD, Director of the Department of Finance and Administration for the State of New Mexico, PAUL MINOGUE, the Director of the Office of Finance and Administration Services for the Health and Environment Department, MICHAEL, BURKHART, Director of the Health Services Division of the Health and Environment Department, FAYE MILLER, the Director of the Office of Family Services of the Health Services Division, in their official and individual capactities,

Defendants.

ORDER

This matter came up on motion of the defendants, the Health and Social Services Department of New Mexico, Vincent Montoya, Max Garcia, Michael Burkhart and Faye Miller, to dismiss the complaint for failure to state a claim upon which relief can be granted. In addition, the defendant Secretary of Agriculture has moved for dismissal or in the alternative for change of venue or stay of the proceedings. Having considered both of these motions and finding neither to be well taken; Now, Therefore,

IT IS ORDERED that the motions to dismiss are hereby denied.

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	

ORDER NUNC PRO TUNC
TEMPORARY RESTRAINING ORDER

THIS MATTER having come on by the cross-claim of the STATE GOVERNMENT DEFENDANTS, and it appearing from the pleadings and documents of record herein that this Court has jurisdiction over the parties and the subject matter and that unless the Secretary of the United States Department of Agriculture is restrained until January 15, 1978 from implementing a review of the New Mexico WIC Program operation to determine whether it has expended its allocation for the months of October and November, 1977, to attain certification and enrollment of persons amounting to at least 90% of its authorized patient caseload, they may suffer irreparable loss by deduction from their WIC Program allocation for the quarter beginning December 1, 1977, of an amount based upon the degree to which they have not expended their October and November, 1977, allocation at 90% of authorized caseload. It further appearing that such failure to achieve a caseload in the New Mexico WIC Program at the proposed requisite amount for such months is a consequence of the STATE GOVERN-

MENT DEFENDANTS' good faith efforts to respond to the plaintiff's complaint herein by pursuing a plan to expand the WIC Program offering to as many counties within the State of New Mexico as is feasible within the Secretary's allocations therefor and in good faith reliance on the Secretary's assurances that caseload levels would not be a determinative factor in the deduction, recovery and reallocation process so long as the program offering continued to expand beyond the counties in which it was originally established.

IT IS THEREFORE ORDERED that the Secretary of the United States Department of Agriculture and his agents and successors are temporarily restrained from making any reduction to the New Mexico WIC Program's allocation for the quarter beginning December 1, 1977 on the basis of whether the New Mexico WIC Program has achieved enrollment and participation of women, infants and children amounting to 90% of its authorized caseload for the months of October and November, 1977, until a hearing can be had on why a preliminary injunction should not issue on STATE GOVERNMENT DEFENDANTS' Cross-claim.

This Order to be effective as of November 30, 1977.

s/E.L. Mechem

DISTRICT JUDGE

Done this 6th day of December, 1977
at 4:45 o'clock P.M.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	

ORDER

THIS MATTER having come on by motion of the STATE GOVERNMENT DEFENDANTS, Cross-Claimants herein, for dissolution of the Temporary Restraining Order entered *Nunc Pro Tunc* on December 6, 1977, with effect from November 30, 1977, and it appearing that they have achieved a participation rate of more than 90 percent of their New Mexico WIC Program obligation level for the months of October and November, 1977 and that they, therefore, will suffer no recovery of funds from their WIC Program allocation for the fiscal quarter beginning December 1, 1977.

IT IS ORDERED that the Temporary Restraining Order previously entered herein be and is dissolved and that the hearing thereon set for December 22, 1977, is vacated.

s/E.L. Mechem

DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	

ORDER

This matter having come up on the Motion of the defendants, the Health and Social Services Department of New Mexico, Vincent Montoya, Max Garcia, Michael Burkhart and Faye Miller, for Summary Judgment, and having considered the motion, the supporting affidavits and the record, and having concluded that the motion is not well taken; Now, Therefore

IT IS ORDERED that defendants' Motion for Summary Judgment be, and it hereby is, denied.

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Petitioners,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	
	]	

MEMORANDUM OPINION

This case arises under 46 USC 1785 et seq., the Special Supplemental Food Program for Women, Infants and Children (WIC). Under the WIC program, the Food and Nutrition Service (FNS) of the United States Department of Agriculture (USDA) awards cash amounts to State health departments or agencies, to Indian tribes and to the Indian Health Service. These recipients then distribute the funds through local public or private health and welfare agencies "to make specified nutritious foods available to infants, children and pregnant and lactating women who are individually determined to be a nutritional risk." 42 USC 1786(b) (1). 7 CFR 246.1 (a). The WIC program is supplemental to the food stamp and food distribution programs administered by the Department of Agriculture. The underlying purpose of the legislation is both remedial and preventive; it is directed specifically at those "determined by competent professionals to be nutritional risks because of inadequate nutrition and inadequate income, in order to improve their health status." 42 USC 1786(b) (1). The legislation dictates that

> Any eligible local health or welfare agency or private nonprofit agency that applies to operate such a supplemental food program immediately shall be provided with the necessary funds to carry out the program. The requirements set forth herein shall not be construed to permit the Secretary to reduce ratably the amount of foods that an eligible health or welfare agency shall distribute under the program to pregnant or lactating mothers and infants. 42 USC 1786(b) (2).

The statute defines "pregnant and lactating women" at nutritional risk to include

> low income populations who demonstrate one or more of the following characteristics: known inadequate nutritional patterns, unacceptably high incidence of anemia, high prematurity rates, or inadequate patterns of growth (underweight, obesity, or stunting). Such term...also includes low-income individuals who have a history of high-risk pregnancy as evidenced by abortion, premature birth, or severe anemia. 42 USC 1786(g) (1).
>
> "Infants" when used in connection with the term "at nutritional risk" means children under 5 years of age who are in low-income populations which have shown a deficient pattern of growth, by minimally acceptable standards, as reflected by an excess number of children in the lower percentiles of height and weight. 42 USC 1786(g) (2).

A State agency participates in the WIC program by submitting an application with annual amendments listing all the local agenices desiring to participate and capable of complying with FNS regulations and guidelines. 7 CFR 246.3(a). "The State agency shall ensure that programs begin in those areas which are most in need of supplemental food. As funds become available, the State agency shall recommend new local agencies to FNS for approval, giving first consideration to those areas which have the highest incidence of factors such as, but not limited to infant mortality, low birth weight, and low income." 7 CFR 246.3(a) (5)." Not only the State administrator, but also the Federal administrator is required by the statute to take affirmative action to insure that WIC programs begin in areas most

in need of supplemental food. 42 USC 1786(d).

Plaintiffs in the present suit are women and children eligible under the statute to receive WIC benefits, but living in counties in New Mexico not served by WIC programs. These plaintiffs seek injunctive and declaratory relief against the Secretary of Agriculture (USDA) and the Health and Social Services Department of New Mexico (HSSD), presently reorganized as the Health Services Division of the Health and Environment Department, State of New Mexico. Both federal question jurisdiction and jurisdiction under the Administrative Procedures Act, 5 USC 701 et seq., are present.

The plaintiffs claim allocation of federal funds at the national level and administration of the WIC program at the state level are not in compliance with the clear mandate of the statute. They ask that the defendant USDA be ordered to change the funding formula presently in use and that the State defendants be ordered to submit annual applications for WIC funds in an amount not less than that established by documented need and to initiate new programs to serve those counties in New Mexico most in need. Both the plaintiffs and the State defendants have moved for summary judgment. Having considered the record as a whole, I conclude in favor of the plaintiffs.

The essential facts are not disputed. The WIC program began in New Mexico in Fiscal Year 1974, serving that year approximately 2700 persons. In Fiscal Year 1976, WIC funds in New Mexico, apart from those disbursed on Indian reservations, operated three programs, two in Bernalillo County and one in Cuba, New Mexico. These projects received approximately $900,000 in federal funds and served 3,000 to 4,000 persons. For Fiscal Year 1977, New Mexico was awarded $1.4 million in WIC funds. These funds were used to support the three initial programs.

The funds available in 1977 were supplemented as a result of a court action in the United States District Court for the District of Columbia. In that suit the Court ordered USDA to expend $562.5 million dollars appropriated by Congress but withheld by the USDA, and also carryover monies from previous fiscal years. Further, the Court ordered that USDA "fund immediately, on a need priority basis, pending eligible applications for

WIC Program implementation..." *Durham v. Butz*, Civ. No. 76-0358, D.Ct. D.C., Decided June 22, 1976. Monies were not sufficient, however, to fund all "pending eligible applications". USDA had to develop a method of distributing approximately $680 million as well as all future funds made available for the WIC program. The USDA used and continues to use the "Title V" formula.

This funding formula derives from the Department of Health Education and Welfare's (HEW) implementation of Title V of the Social Security Act, 42 USC 701, entitled Maternal and Child Health and Crippled Children's Services. In allocation of Title V funds, HEW takes one-half of the available monies, gives each State a minimum equal amount, and then adds "such part of the amount remaining as the number of live births in the State bears to the total number in the United States." 42 CFR 51a.123(c) (1). The other half of the available monies is distributed by HEW and

> ...apportioned among the State according to the need of each State for financial assistance in carrying out its State plan after taking into consideration the number of live births in each State and per capital (sic) income in each State. The apportionments vary directly with the number of live births in the State, and the number in rural areas of the State, with rural births given twice the weight of urban births. The apportionments vary inversely with State per capita income. 42 CFR 51a.123(c) (2).

FNS puts forth four reasons for their use of the Title V formula: "(1) It contains criteria that can be consistently applied nationwide; (2) It is based on the Department of Health, Education and Welfare's (DHEW) perception of the nation's health needs; and (4) In January 1976, many State agency WIC Program Directors recommended its usage to USDA (FNS)." Letter dated August 19, 1976, FNS to HSSD. The enabling legislation, however, makes consideration of several factors mandatory to the Secretary's decision in allocating funds. The reasons stated by FNS for use of the Title V formula do not address the factors made relevant by Congress: high rates of infant mortality, low birth weight, high incidence of anemia, high prematurity rates, abnormal growth patterns, excess numbers of

children in the lower percentiles of height and weight.

The initial question is whether this court can review governmental agency action. Except where there is a statutory prohibition or a "showing of 'clear and convincing evidence' of a contrary legislative intent", 5 USC 701 provides that the action of "each authority of the Government of the United States" is subject to judicial review. *Abbott Laboratories v. Gardner*, 387 US 136 (1967). *Citizens of Overton Park v. Volpe*, 401 US 402 (1971). I find in the present case that the statute does not preclude judicial review. Neither do I find that the Secretary's actions are committed by law solely to his discretion. "The question is phrased in terms of 'prohibition' rather than 'authorization' because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe such was the purpose of Congress;" and the Administrative Procedures Act "manifests a congressional intention that it cover a broad spectrum of administrative actions." *Abbott Laboratories, supra.*, at 140.

The second question, of course, is the standard of review. In *Citizens to Preserve Overton Park v. Volpe, supra.*, the plaintiffs sought to enjoin a proposed six-lane highway through a 342 acre park located in Memphis, Tennessee. The plaintiffs relied on Section 4(f) of the Department of Transportation Act of 1966 and Section 18(a) of the Federal Highway Act of 1968 which prohibited the Secretary of Transportation approving expenditure of Federal funds to construct highways through public parks if a "feasible and prudent" alternative route existed. Secretary Volpe had approved an expressway through Memphis that would have destroyed 26 acres of parkland and severed the zoo from the rest of the city park. The District Court and the Court of Appeals held that the affidavits in the record did not establish that the Secretary had exceeded his authority. The Supreme Court reversed. The standard of review applied was whether the agency action was arbitrary, capricious, abused discretion, otherwise did not accord with law, or failed to meet statutory, procedural or constitutional requirements. *Overton Park, supra.*, at 414.

A reviewing Court "must consider whether the decision was

based on consideration of the relevant factors and whether there has been a clear error of judgment... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judment for that of the agency." Id. at 416. In *Overton* the Court found "law to apply". Congress clearly set out what was to be given paramount importance in the Secretary's decision to approve or withhold federal funds for local highway construction. "Congress has specified only a small range of choices that the Secretary can make, Also involved in this initial inquiry is determination of whether on the facts the Secretary's decision can reasonably be said to be within that range." *Id.*

Using the required standard then, I conclude as to this action that USDA has failed to comply with the statute. The legislation is directed at a specific purpose far narrower than expending more federal funds in areas of low income, and accordingly, the statute enumerates specific factors that must be considered by the Secretary in order that monies appropriated for WIC programs be divided among the States by a method reasonably calculated to serve the ends Congress intended. Failure to consider all relevant factors constitutes an abuse of discretion. *Citizens to Preserve Overton Park v. Volpe, supra.*

Evidence in the record indicates that the State of New Mexico may have greater needs in the nutritional area than many other states. "Low birth weight is a genuine problem in New Mexico. Our low birth weightedness is 23% higher than the U.S. average. New Mexico has an incidence of 9.1% as compared with 7.4% U.S. average for infants born weighing less than 2500 grams;" Fiscal Year 1977 New Mexico Application for WIC funds dated July 29, 1976 (Statistics based on *New Mexico Health Statistics 1974 Annual Report*);"... the New Mexico infant mortality rate for 1974 was 18.3 while the U.S. rate is 16.1." *Id.*

In the case of *Durham v. Butz, supra.*, the Court approved the Defendants' Plan for Implementation of the Court's Order by Order entered July 30, 1976. The Implementation Plan included use of the Title V formula. Pursuant to this plan, the FNS used the Title V formula to rank states for determining distribution of WIC funds. According to FNS statistics, New Mexico by population ranks among the 50 states as 37th. Based

on Title V considerations, New Mexico ranks 35th. On the basis of infant mortality rate New Mexico ranks 35th; and on the basis of low income, New Mexico ranks 34th. (The *New Mexico Selected Health Statistics 1974 Annual Report* ranks New Mexico 48th on the basis of per capita income.) As a result of the FNS analysis, the decision in *Durham, supra.*, application of the Title V formula, and the application submitted by HSSD, requesting an amount less than the Title V allocation, New Mexico was allocated, from a total available amount of $686,490,000, $3,280,030 for a 27-month period beginning July 1, 1976, that is $1,303,113 for Fiscal Year 1976.

New Mexico's allocation of WIC funds whether based on Title V calculations or the considerations specifically expressed in 42 USC 1786 et seq. may result in no appreciable difference. Nevertheless, USDA has an affirmative obligation to weigh all of the relevant factors set out in the enabling legislation and only when so weighed can the Secretary determine whether his choice of a funding formula is supported by the facts. The statute involved here does not give the Secretary unlimited discretion.

The responsibility to serve first those persons most in need of WIC benefits rests on the State defendants as well as USDA. New Mexico initiated three WIC programs and later planned state-wide expansion. Much of the failure in program growth has been lack of funding from FNS. The plaintiffs contend, however, that the decision where to establish the first three programs was arbitrary and without consideration of which areas of the state were most in need. The plaintiffs contend, further, that despite an established need for WID funds at $7 to $8 million, the State defendants have never applied for any funding even near that amount from FNS and, as a result, the State has received less than it could have received under the present funding formula.

New Mexico's "27-Month Plan of Action" states:

> Currently the Health and Social Services Department WIC program is operating through 3 local agencies serving Bernalillo County and portions of Sandoval County, San Juan County and Rio Arriba County (the last three aforementioned counties are known as the Cuba Checkerboard Area). WIC local agencies were initiated in these

areas before any requirement for an "Affirmative Action Plan" was established. Now that the New Mexico Health and Social Services Department WIC progrm has an approved "Affirmative Action Plan", the action is being initiated to begin serving previously unserved counties in accordance with the Health and Social Services Department WIC approved "Affirmative Action Plan". The New Mexico Health and Social Services Department State Health Agency's local health offices will be utilized in any future WIC local agency operations. The local health office network covers every county in New Mexico.

Thus there exists no dispute that the existing programs were begun without consideration of areas most in need or that all New Mexico counties have health agencies capable of conducting WIC programs.

Similarly there exists no dispute that the State defendants, by not applying for the amount of funds actually necessary for WIC programs to be carried on throughout New Mexico, have deprived the plaintiffs of available federal funds to which they were otherwise entitled. This actual need, known to the State defendants as evidenced by their "27-Month Plan", their "WIC Clinic Expansion Schedule", and other documents on file, ranges between $7 million and $8 million annually. Yet the State's WIC applications have consistently requested significantly less. In its analysis after *Durham*, FNS classified New Mexico in the C Category because, while many states understandably requested more than they could have equitable been entitled, New Mexico failed to request even as much as it could have received.

Since the initiation of this lawsuit the State defendants have set priorities for the counties in New Mexico which need WIC services, have expanded the New Mexico WIC service accordingly and have indicated to FNS that they could spend more than the federal monies presently allocated. The remedies the plaintiff's seek, therefore, have been partially provided. Further delivery of supplemental foods in New Mexico depends largely on the federal funds provided for that purpose.

The plaintiffs' rights are to be declared, then, and can be protected by review of the funding formula by USDA, by con-

sideration of all relevant factors and by revision of the formula if warranted, and by a continuing supervision over the state's WIC activities, including annual applications, proposed and consummated expansions, spending level and staffing and administration, to see that the plaintiffs are not without benefits they would receive by virture of 42 USC 1786 but for acts of the State defendants. An order will be entered in compliance with this Memorandum Opinion.

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	

DECLARATORY JUDGMENT
AND
ORDER

This case having come up on cross motions for summary judgment and having considered the record and motions and being fully advised in the premises, and having entered this date a memorandum opinion, I conclude that the plaintiffs are entitled to summary judgment. Now, Therefore,

IT IS DECLARED AND DECREED that the defendant, the Secretary of Agriculture and the State defendants to this action have an express duty to allocate funds pursuant to the Special Supplemental Food Program for Women, Infants and Children (WIC), 42 USC 1786, to those most in need of supplemental nutrition, and that the funding formula adopted by the United States Department of Agriculture pursuant to 42 USC 1786 et seq., does not take into account the mandatory considerations given in the statute, and the present administration and location of programs in the State of New Mexico does not serve those women, infants and children eligible to receive benefits pursuant

to 42 USC 1786 et seq., most in need of supplemental nutrition; and

IT IS ORDERED that the defendant, the Secretary of Agriculture review and reconsider the funding formula now in use for WIC funds, take into account the relevant factors given in the enabling legislation, and report to this Court within 130 days the results of such re-evaluation, including justification of the use of the present formula or proposal for change to a new formula, either of which is best calculated to achieve the objectives of the statute; and

IT IS FURTHER ORDERED that the State defendants make an immediate effort to establish WIC programs in all counties of the State of New Mexico, beginning in those counties demonstrating the greatest need for supplemental nutrition, and that the State defendants insure that all future New Mexico WIC applications request federal funding in the amount of the full documented need for such funds, within the state; and

IT IS FURTHER ORDERED that the State defendants submit to this Court a copy of its 1978 and 1979 WIC applications, accompanied by sufficient documentation to indicate that such applications were based on the full amount of needs established in New Mexico on the basis of a statewide WIC program, and that the State defendants submit to this Court on October 1, 1978, and on the first day of each quarter thereafter until the end of the 1979 calendar year, a report of those counties operating WIC programs, the number of persons served, and of those counties not served by WIC programs with explanation by documented evidence as to why these counties are not being served.

This Court hereby retains jurisdiction until further order of the Court.

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	

ORDER

This matter came up on motion of the plaintiffs for attorney's fees pursuant to 42 USC 1988. Judgment was entered in this cause August 21, 1978, and jurisdiction continues until further Court order.

I have considered the motion and responsive pleadings and being otherwise fully advised in the premises, I find the motion is well taken.

I conclude that the plaintiff's action was brought to enforce due process rights denied by the defendants; that the plaintiffs have prevailed in their action; that an award of fees in favor of plaintiffs and against the state defendants is reasonable and proper, and that the amount of $5,000.00 for said fees is equitable. Now, Therefore,

IT IS ORDERED that the plaintiffs motion for attorney's fees is hereby granted; the plaintiffs are awarded as said fees the amount of $5,000.00 to be paid by the state defendants.

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs-Appellees,	]	
	]	
v.	]	Nos. 78-1933
	]	and
ROBERT BERGLAND, Acting	]	78-1937
Secretary of Agriculture,	]	
	]	
Defendant-Appellant,	]	
	]	
and	]	
THE HEALTH AND	]	
ENVIRONMENT DEPART-	]	
MENT OF THE STATE OF	]	
MEW MEXICO, et al.,	]	
	]	
Defendants-Appellants.	]	
	]	

JUDGMENT AND OPINION

This action arose under Section 17 of the Child Nutrition Act of 1966, codified as 42 U.S.C. § 1786. That section created, authorized expenditure of funds and established administrative procedures and standards for what is known generally as the Special Supplemental Food Program for Women, Infants and Children.

In the district court, the plaintiffs, a group of women and children eligible to receive benefits under the Program, successfully challenged defendants' non-performance of certain duties required by the statute.

On August 21, 1978, a declaratory judgment and order was entered in which the district court concluded that defendants had failed to properly implement the SSF Program and directed that defendants undertake immediate action to insure future compliance with the "mandatory considerations" of § 1786. Later, the state defendants were directed to pay plaintiffs' attorney's fees. The federal defendant appealed from the August 21, 1978 judgment and order and the state defendants appealed from both orders.

Following the filing of the timely notices of appeal, Public Law 95-627 was approved. Appellant Bergland suggests that certain modification to § 1786 contained in P.L. 95-627 has substantially altered the law applicable to the case and also that subsequent events have rendered the matter moot as to him. Appellees, on the other hand, deny that the law has changed significantly since the entry of the district court's judgment and order.

The post-judgment legislation, as we understand it, resurrected the SSF Program authorized under the "old" § 1786 which had expired by its own terms on September 30, 1978. Although the "new" version § 1786 appears to carry forward the same general objective and design of its predecessor, the current statute is by no means an exact replica.

We are, of course, obligated to notice and consider any changes in the law which have supervened since the entry of the judgment appealed from. Bell v. Maryland, 378 U.S. 226 (1964); Concerned Citizens of Vicksburg v. Sills, 576 f.2d 646 (5th Cir. 1978). Whether the law and circumstances have changed so as to alter the present vitality of the plaintiffs' claims or detract from the enforceability of the district court's judgment are difficult and complex questions which we will not now undertake to answer in appellate setting. McLeod v. General Electric Company, 385 U.S. 533 (1967); Childs v. United States Board of Parole, 511 f2d 1270 (D.C. Cir. 1974). Instead, this matter will be remanded to the district court for fresh consideration there of the respective rights and obligations of the parties in light of whatever intervening changes of law and circumstances are relevant. In order to give the district court full and complete latitude

upon remand, we vacate the declaratory judgment and order entered on August 21, 1978 and the order pertaining to the award of attorney's fees entered on October 12, 1978.

At the conclusion of the reappraisal of the current status of the controversy and upon entry of a definitive judgment, the district court will be free to again consider the award of attorney's fees to the prevailing party and to make an order accordingly.

The judgment and orders appealed from are vacated and the matter is remanded for further proceedings. Appellee's motion to dismiss the appeal in 78-1933 is denied as moot.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendant.	]	

ORDER

This case comes up on remand from the Court of Appeals to consider whether Public Law 95-627 is a substantial alteration of the law upon which Judgment was based. The Mandate of the Court of Appeals vacated both the Judgment and the award of attorney's fees.

Judgment in this cause rested on the mandatory considerations of the statute setting out the Special Supplemental Food Program for Women, Infant and Children (WIC) and the failure of the Health, Education and Welfare "Title V" funding formula, adopted by the Secretary of Agriculture, to include those consideration. Judgment was entered against the state defendants on the basis of their acceptance of the "Title V formula" and their failure otherwise to implement the federal program as the pre-judgment statute directed.

Public Law 95-627, the Child Nutrition Amendments of 1978, extends and amends the Special Supplemental Food Program. In addition to new appropriations, it changes the means by which the Secretary of Agriculture assists the State programs,

distributes funds, and provides for State administrative expenses. The new Act provides additional funds and advance start-up costs for areas in need not receiving a program. While not changing the objectives of the pre-judgment Act, the new Act broadens the definition of "nutritional risk" and grants more discretion to the Secretary to determine a funding formula. Section 3 of Public Law 95-627, amending Section 17 of the Child Nutrition Act of 1966, still includes, however, a provision that:

> ...The Secretary shall take affirmative action to ensure that the program is instituted in areas most in need of supplemental foods. Sec. 17(c) (3).

When plaintiffs filed their complaint, the State of New Mexico had three operative WIC programs. Plaintiffs alleged first, that federal WIC implementation, by reason of the "Title V" funding, did not comport with statutory requirements and did not give New Mexico its share of available monies; and, further, that State WIC implementation did not serve areas "most in need". Both of plaintiffs' arguments are no longer viable, not only because of changes in the law, but also because of changes in the funding formula and that status of New Mexico WIC programs.

Use of the "Title V formula" has been abandoned. A recently promulgated formula takes into account poverty, population and health factors. The new formula is not at issue in this case. It is sufficient to state that the new formula has provided additional funds for New Mexico and has allowed statewide expansion of WIC programs. Pursuant to the Judgment entered August 21, 1978, the state defendants have made reports of WIC activities. Those reports indicate a consistently expanding WIC program in New Mexico that now covers all but one of the counties in which the plaintiffs reside. The affidavit of John J. Whitehead, WIC Program Manager for New Mexico, states:

> The WIC Program benefits are and have been available to all individual Plaintiffs except one, and as to that one, WIC Program benefits should be available on or before June 30, 1979, as shown by the Affidavit of Michael J. Burkhart dated May 9, 1979.

Although the new law continues to provide that areas "most in need" be serviced first, it sets a standard of "neediest one-third." The state defendants are not obligated, therefore, to immediate, statewide total-implementation. In a well-articulated brief, the state defendants set out a sound basis for their motion to dismiss.

> This Court relied on 7CFR 246.3(2) (5) to require the state government defendants in this action to submit annual applications for WIC funds in an amount not less than that established by documented need and to initiate new programs to serve those counties in New Mexico most in need... The 1978 statutory amendments at P.L. 95-627 clearly establish a specific standard for program expansion at 42 USCA 1786(f) (1) determination conclusively removes all basis for plaintiffs' claim that the State is obligated to immediate statewide expansion or to apply for federal funding in an amount equaling full documented need... Brief in Support of State Government Defendants' Motion to Dismiss, 2.

Whether by the Judgment in this action, by the new Act, or by the appropriate changes in WIC programs in the State of New Mexico, the plaintiffs have received all they requested. Only one plaintiff remains to be reached by a WIC program and that program is planned and nearly activated. Nothing is left for the plaintiffs to gain. A case or controversy no longer exists.

The successful termination of this action justifies the award of attorney's fees previously entered. Even where the suit must end in dismissal for mootness and even if some of the benefits rendered the plaintiffs result from changes in the statute, plaintiffs' action succeeds as a catalyst, having forced both the Secretary of Agriculture and the state defendants to examine WIC funding and services at the national as well as the state level and to provide WIC programs where they had not previously existed. The change in the funding formula came after entry of Judgment in favor of the plaintiffs. It is reasonable to infer that the action and the Judgment had an impact not only on the changes in the law, but also on the enlargment and increased efficiency of WIC programs in New Mexico, and, most especially,

on the formulation of a carefully tailored WIC funding scheme both equitable and efficacious.

Now, Therefore,

IT IS ORDERED that this action against all defendants is hereby dismissed as moot, and

IT IS FURTHER ORDERED that the award of attorney's fees entered in this cause October 12, 1978, is hereby reinstated, the state defendants to pay to the plaintiffs the amount of $5,000.00

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX K

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs,	]	
	]	
v.	]	No. 76-629-M Civil
	]	
ROBERT BERGLAND, et al.,	]	
	]	
Defendants.	]	

ORDER

This matter comes up on motion of the state defendants to reconsider an award of attorney's fees to plaintiffs. I conclude that the plaintiffs' action was successful as a catalyst for change, that an award of attorney's fees is just and proper, that the action was one within the purview of 28 USC 1343(3) and (4), and that the award does not violate the provisions of the Eleventh Amendment to the United States Constitution. Now, Therefore,

IT IS ORDERED that the defendants' motion to reconsider is hereby defined.

s/E.L. Mechem

UNITED STATES DISTRICT JUDGE

APPENDIX L

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JAN NUNEZ, et al.,	]	
	]	
Plaintiffs-Appellees-Cross Appellants,	]	
	]	
v.	]	No. 79-1704
ROBERT BERGLAND, Acting Secretary of Agriculture,	]	and 79-1705
	]	
Defendant,	]	
	]	
	]	
and	]	
THE HEALTH AND ENVIRONMENT DEPARTMENT OF THE STATE OF NEW MEXICO, et al.,	]	
	]	
Defendants-Appellants-Cross Appellees.	]	
	]	

JUDGMENT AND OPINION

The primary issue presented in this case is whether plaintiffs are "prevailing parties" for the purpose of the attorneys' fees award provision at 42 U.S.C. § 1988.

the case arose under 42 U.S.C. § 1786, the Special Supplemental Food Program for Women, Infants and Children (WIC). The program is designed to provide high nutrient foods to certain women and to children under five years of age considered to

be at nutritional risk. The Secretary of Agriculture was empowered to make cash grants to appropriate state agencies for the purpose of providing funds to local health or welfare agencies or private nonprofit agencies. At the time suit was instituted, the Secretary was statutorily obligated to insure that programs begin in areas most in need of special supplemental food. 42 U.S.C.A. § 1786(d) (1978.

At the time suit was commenced only three counties in New Mexico were administering the program. Plaintiffs-Appellees are a group of women and children eligible for benefits under WIC. They reside in various communities throughout the state, none of which participated in WIC at the time their complaint was filed in November 1976. Plaintiffs sought injunctive and declaratory relief against the USDA and the Health and Social Services Department of New Mexico (HSSD), presently reorganized as the Health Services Division of the Health and Environment Department.

Upon consideration of cross motions for summary judgment filed by plaintiffs and the state defendants the court entered declaratory judgment in favor of plaintiffs. The court found that the funding formula used by USDA was not directed at ascertaining which areas were most in need of WIC according to the several criteria of nutritional risk enumerated in the statute. As to the state defendants, the court concluded that although much of the failure in program growth was due to a lack of federal funding, HSSD had established its three functional programs without consideration of which areas of the state were most in need. The court also found that the uncontroverted evidence established that the state had not applied for the amount of federal funds to which it knew it was entitled.

Accordingly, the court ordered USDA to consider in its funding formula the relevant factors in the enabling legislation. The state was directed to make an immediate effort to establish statewide WIC programs, starting with those counties demonstrating the greatest need for supplemental food, and was further directed to apply for sufficient federal funds in its WIC applications. The court retained jurisdiction to receive quarterly reports from HSSD detailing compliance with its orders and indicating the progress of WIC expansion.

Counsel for plaintiffs moved the court to award interim attorneys' fees against the state pursuant to 42 U.S.C. § 1988. Finding that plaintiffs prevailed in their action to enforce due process rights denied by the defendants, the court awarded fees in the amount of $5,000 to be paid by the state defendants.

Both the federal and state defendants appealed from the court's declaratory judgment and order. The state defendants appealed from the award of attorneys' fees as well.

Following the filing of the notices of appeal, Public Law 95-627 was enacted. the USDA argued that this amendment to 42 U.S.C. § 1786 altered the criteria to be considered in its funding formula for WIC grants and mooted the present controversy as to the federal defendants. We vacated the judgment and orders to give the district court complete latitude on remand and directed that court to consider "the respective rights and obligations of the parties in light of whatever intervening changes of law and circumstances are relevant." Nunez v. Bergland, Nos. 78-1933, 78-1937 (10th Cir., filed April 4, 1979). We specifically noted that upon entry of a definitive judgment, the district court will be free to award attorneys' fees to the prevailing party.

On remand, the district court noted that the challenged funding formula had been abandoned providing additional funds for New Mexico and that the state had implemented WIC programs in all but one of the counties in which plaintiffs reside. The court said:

> "Whether by the Judgment in this action, by the new Act, or by the appropriate changes in WIC programs in the State of New Mexico, the plaintiffs have received all they requested."

The court dismissed the action as moot, but reinstated its earlier award of attorneys' fees of $5,000. In support thereof the court concluded:

> "The successful termination of this action justifies the award of attorney's fees previously entered. Even where the suit must end in dismissal for mootness and even if some of the benefits rendered the plaintiffs result from changes in the statute, plaintiffs' action succeeds as a catalyst, having forced both the Secretary of Agriculture and the state defendants to examine WIC funding and ser-

vices at the national as well as the state level and to provide WIC programs where they had not previously existed. The change in the funding formula came after entry of Judgment in favor of the plaintiffs. It is reasonable to infer that the action and the Judgment had an impact not only on the changes in the law, but also on the enlargement and increased efficiency of WIC programs in New Mexico, and, most especially, on the formulation of a carefully tailored WIC funding scheme both equitable and efficacious."

Section 1988 authorizes the trial courts to award reasonable attorneys' fees to the "prevailing party" in an action brought under any of several specified civil rights statutes. Congress clearly intended that such an award should ordinarily issue unless special circumstances would render an award unjust. Love v. Mayor of Cheyenne, 620 F.2d 235, 236 (10th Cir.); Dawson v. Pastrick, 600 F.2d 70, 79 (7th Cir.). It is well established that a litigant may be considered a "prevailing party" without having obtained a favorable judicial determination on the merits. Maher v. Gagne, 448 U.S. 122, 129; Chicano Police Officer's Association v. Stover, 624 F.2d 127, 131 (10th Cir.). "Thus, for example, 'parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.' " Hanrahan v. Hampton, 446 U.S. 754, 757, *quoting* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5912. *See also Stover*, 624 F.2d, at 131.

In such cases which are terminated either by settlement, consent decree or voluntary compliance, our focus is on whether the litigant succeeded "on any significant issue in litigation which achieves some of the benefits sought in bringing the suit." Battle v. Anderson, 614 F.2d 251, 258 (10th Cir.). *See also Stover*, at 131. Moreover, the litigation must have played a significant role in achieving the desired objectives. The determination of whether these two factors, achievement of desired results and causation, are present is one to be made by the trial court after consideration of the facts of each case. *Stover*, at 131. This test to determine the propriety of an attorneys' fees award aunder section 1988 has been applied in cases which were mooted "by cessation of the complained of practice or alteration of the

challenged policy." Coyote v. Roberts, 502 F. Supp. 1342, 1346 (D.R.I.).

Quite clearly where the proceedings brought by the plaintiff act as a catalyst in achieving a primary objective of the lawsuit, he can properly be considered a prevailing party although he has not obtained a judicial determination on the merits. Gurule v. Wilson, 635 F.2d 782, 791 (10th Cir.); Morrison v. Ayoob, 627 F.2d 669, 670-72 (3rd Cir.); Williams v. Miller, 620 F.2d 199, 202 (8th Cir.).

This court recently addressed the issue of attorneys' fees in *Gurule*. In that case, plaintiffs challenged policies of defendant prison officials on procedural due process grounds. During the litigation, defendants promulgated a prison manual which substantially complied with plaintiffs' demands. We held that the lawsuit was a catalyst in securing the procedural rights sought by plaintiffs. We based our conclusion on a review of the litigation as a whole.

After reviewing the record we are satisfied that plaintiffs prevailed in this action. The complaint sought to compel WIC program expansion in New Mexico. The district court noted the causal relationship between plaiantiffs' initiation of the lawsuit and defendants' enlargement and increased efficiency of WIC programs in the state. The record adequately demonstrates the court's finding that it considered the lawsuit as a catalyst in achieving plaintiffs' ultimate objective.

It should be again mentioned that plaintiffs received a favorable judgment. Subsequent to rendition of the judgment Congress passed the Child Nutrition Amendments, Public Law 95-627. It was not until the passage of this act that the question of mootness arose. The subsequent dismissal of the case for mootness necessarily terminated the district court's continuing jurisdiction to enforce its declaratory judgment and order.

Plaintiffs, however, argue that the court abused its discretion in awarding only $5,000 in attorneys' fees in light of their submission of records documenting an amount of legal work substantially in excess of that amount. The trial court first awarded $5,000 in fees following the proceedings in that court before our remand. Plaintiffs did not argue the sufficiency of the award either at that time or on appeal. The issue was not

raised when the district court reinstated its previous award on remand. Thus, plaintiffs failed to make this argument on three appropriate occasions. The first time plaintiffs were heard to complain about the size of the fee award was on appeal following the reinstatement of the $5,000 fee. The argument was brought to our attention by the filing of a cross-appeal docketed No. 79-1705. We decline to consider it as it was clearly untimely raised. *See, e.g.*, Steagald v. United States, U.S. , 49 U.S.L.W. 4418; Shah v. Halliburton Company, 627 F.2d 1055 (10th Cir.); Neu v. Grant, 548 F.2d 281 (10th Cir.).

Plaintiffs are also entitled to attorneys' fees for this appeal and under the mandate the trial court shall determine the amount of such fees and make the award.

AFFIRMED.

APPENDIX M

IN THE

Supreme Court of the United States

No. A-328

GEORGE S. GOLDSTEIN, SECRETARY,

Petitioner

v.

JAN NUNEZ, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner ( ), IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

December 16 , 1981

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 22nd

day of October , 19 81

Opposition

81-1293

Office - Supreme Court, U.S.
FILED
JAN 12 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

No. _____

GEORGE S. GOLDSTEIN, Ph.D.,
Secretary, New Mexico Health and Environment Department,
Petitioner,

vs.

JAN NUNEZ, BRENDA YTURRALDE, DEBBIE CASAUS, ARCELIA PEYTON, BERNICE MARTINEZ, PAULINE McDANIELS, MARY ANN CHAVEZ, JESSIE GOMEZ, ANA BENAVIDEZ, MARIA GOMEZ, LEONA VASQUES, JOANN McCUTCHEON, DOROTHY PARKER, DOLORES MARTINEZ, CELINA SAAVEDRA, RUTHIE WARE, LUCINDA WARE, NEW MEXICO COUNCIL ON FOOD NUTRITION AND HEALTH,
Respondents.

OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUPPLEMENTARY STATEMENT OF THE CASE

Although there are contained in the Petition many inaccuracies, because of Respondent's awareness, the volume of cases presented of this court, Respondent's comments will be brief.

Petitioners indicate that the case arises under the Civil Rights Attorneys Fees Award Act, 42 USC, Section 1988, and the Special Supplemental Food Program for Women, Infants and Children (WIC), 42 USC Section 1786. (Petition pp 3-4). Petitioners do not mention . . . "that the action was one within the preview of 28 USC 1343 (3) and (4) (Please see the Order of the District Court filed July 12, 1979 and found at Appendix K to the Petition, page 50). Nor do Petitioners mention that the district court concluded, based on allegations of violations by Respondents of the Fourteenth Amendment contained in their complaint, ". . . that the Plaintiff's action was brought to enforce due process rights denied by the defendants . . ." (Please see the Order of the district court filed October 12, 1978, Appendix H to Petition, page 42). Consequently, the case also arises under the Constitution of the United States.

The Court of Appeals was cognizant of the constitutional basis for the grant of attorneys fees to the Plaintiff's (Respondents herein) (Please see Appendix L. to the Petition, at p. 53).

The district court in its memorandum opinion of August 2, 1978 (Please see Appendix F to the Petition, p. 31, at 38) concluded that the Petitioners by not requesting funds commensurate with actual need had deprived Plaintiffs of funds to which they were otherwise entitled. The Court ordered the institution of a monitoring program to assure Petitioner's applications to the Secretary were based on complete need (Please see the Order of August 21, 1978, Appendix G to the Petition, p. 40, at 41).

The jurisdictional question was briefed and argued at the trial court level, and at the appellate level twice (Petition p. 15), always in the context as it here appears, i.e. jurisdiction over statutory claims coupled with constitutional claims. The last time on appeal it was decided adversely to Petitioners *sub silentio*.

REASONS FOR DENYING THE WRIT

The Petition lists three questions:

Whether WIC creates rights in participants against States participating? Whether fees are awardable against an innocent party? Whether WIC creates a private right of action in favor of beneficiaries and against participating states? (Petition p. 2).

None of the questions presented fall within the preview of Rule 17, Rules of the Supreme Court except possibly one.

The first and second reason posited by Petitioner for granting the Writ, attempting to bring himself within the language of *Pennhurst State School vs. Halderman*, ___ US ___, ___ S Ct. ___, 67 L Ed 2d 694 (1981), is that in accepting federal monies he should be bound only by contractual terms and conditions of which he is made aware. It is contended that because Petitioner was purportedly unaware of the contract terms, he is innocent of any wrongdoing and should not have been required to pay attorney's fees.

The answer to these contentions are twofold. First, Petitioner was aware of federal regulations requiring that he, as well as the Secretary of Agriculture, take affirmative action to insure programs begin in areas most in need, which is also required by the statute. (Please see Appendix F to the Petition, pp. 32-33, 37). Petitioner was neither innocent nor unaware.

Second, as will appear more fully below in Respondent's discussion of jurisdiction, because this case, unlike *Pennhurst*, supra, rests on a constitutional as well as statutory base, whether or not Petitioner was aware of the terms of the contract with the Secretary of Agriculture is not relevant.

The last reason posited for granting the Writ is premised on the erroneous belief that jurisdiction in this case is based solely on statutory, non constitutional, grounds. That is simply not true (Please see the supplemental Statement of the case above).

The plaintiffs in their complaint in this case allege violations of the Fourteenth Amendment to the United States and the New Mexico Constitution which includes equal protection (an unconstitutional preference) and due process, in conjunction with 42 USC Section 1983, the court finding that the acts and omissions of the defendants

violated plaintiffs Due Process Rights (Please see Appendix H to the Petition, p. 42). The Complaint also alleges nonconformity with the federal standard, but that cannot be fatal to plaintiffs' complaint as the doctrine of pendent jurisdiction permits adjudication of that claim, despite the absence, which is not the case here, of primary jurisdiction. Consequently, the district court had pendent jurisdiction over the nonconstitutional claims — state and federal.

Thus, even if a federal court does not have subject matter jurisdiction over a claim by virtue of a specific statute, e.g., if one of the claims is a state claim, or if the $10,000 amount in controversy had not been met, or if one of the claims is a statutory claim, this Court has held that it may exercise jurisdiction over such a claim where it is "pendent" to another claim over which the court *does* have a specific grant of subject matter jurisdiction. *United Mine Workers v. Gibbs*, 383 US 715, 86 S Ct 1130, 16 L Ed 2d 218 (1966); *Rosado v. Wyman*, 397 U.S. 397, 90 S Ct 1207, 25 L Ed 2d 442 (1970); *Hagans v. Lavine*, 415 U.S. 528, 94 S Ct 1372, 39 L Ed 2d 577 (1974). A court may exercise pendent jurisdiction under *Gibbs* and its progeny where there is a common question of fact or law between the two claims, and where one would ordinarily be expected to try both in the same proceedings.

The argument for exercising pendent jurisdiction is strongest where the "pendent" claim is a *federal* one. See *Hagans*, supra.

Assuming, *arquendo*, that the case herein was one premised solely on a statutory claim, that would not aid Petitioners. Since the Courts opinion in *Pennhurst*, its holding has been explained in *Middlesex County Sewerage Authority v. National Sea Clammers Assoc.*, 49 LW 4783 (June 25, 1981).

Among other things *Middlesex* held that a private right of action is foreclosed by implication if the statute supplants remedies which would otherwise be available under 42 USC Section 1983 with comprehensive enforcement mechanisms.

Significantly, 42 USC Section 1786 nowhere provides an enforcement mechanism which would require the state to apply for funds on a full need basis. That could be accomplished only by a Section 1983 action.

Finally, the Petition should be denied as not being timely filed.

CONCLUSION

For the foregoing reasons Plaintiffs request that the Petition be denied.

Respectfully Submitted,

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Petitioner's Reply Brief

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CLERK

No. 81-1293

IN THE

Supreme Court of the United States

October Term, 1981

GEORGE S. GOLDSTEIN, Ph.D.,
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v.

JAN NUNEZ, BRENDA YTURRALDE, DEBBIE CASAUS, ARCELIA PEYTON, BERNICE MARTINEZ, PAULINE McDANIELS, MARY ANN CHAVEZ, JESSIE GOMEZ, ANA BENAVIDEZ, MARIA GOMEZ, LEONA VASQUES, JOANN McCUTCHEON, DOROTHY PARKER, DOLORES MARTINEZ, CELINA SAAVEDRA, RUTHIE WARE, LUCINDA WARE, NEW MEXICO COUNCIL ON FOOD NUTRITION AND HEALTH,
Respondents.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH COURT

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PETITIONER'S REPLY

Throughout the conduct of the litigation below, Petitioner has believed that the District Court justified its award of attorney's fees to Respondents by relying on this Court's decision in Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), which held that 42 USC § 1983 authorizes suits to redress alleged violations by state officials of rights created by federal statutes. And Petitioner questioned whether such enforceable "rights" were created in the WIC Statute, 42 USC § 1786 (Appendixes A-1, A-2, and A-3 in the Appendix to the Petition).

In their Opposition Brief, Respondents have claim that their victory was constitutionally based as well, and rely on District Court language concerning the "due process rights" of Respondents (Appendix H at page 42). Respondents are incorrect when they claim, at page 2 of the Opposition Brief, that Pennhurst

State School v. Halderman, ___U.S.___, 101 S.Ct. ____, 67 L.Ed. 2d 694 (1981), lacked a constitutional base: On the contrary, the District Court in Pennhurst, supra, found that Congress had enacted the Developmentally Disabled Act pursuant to Section 5 of the Fourteenth Amendment. Unlike the Plaintiffs there, Respondents here, never claimed that the WIC Statute was enacted by Congress pursuant to Section 5 of the Fourteenth Amendment. Therefore, they are relying, as their Brief makes clear, on the Due Process language of that Amendment and the use of that phrase in the District Court's original Order awarding attorney's fees. (Appendix H, at page 42.) Nowhere else in the two District Court opinions or the two Tenth Circuit opinions is a constitutional basis mentioned.

But Due Process does not exist in a vacuum: It must be either implied in the Constitution itself or expressed in positive law; in this case it is not implied in the Constitution.

Neither have Respondents claimed that there is a Constitutional right to Supplemental Food. Thus, the process that is due them and which they have allegedly been denied must be in the laws; that is, it must exist in the WIC Statute itself. Such a "right" was evidently found by the District Court. That Court, in its first Opinion, said that Petitioner had "deprived the Plaintiffs of available federal funds to which they were otherwise entitled". (Appendix F, at page 38.)

In his Petition, Petitioner observes that Congress not only did not require states to seek statewide funding for the WIC Program but also that Congress specifically denied that the WIC Program was an "entitlement" program. (Petition, at page 8.) Now, in their Opposition Brief, Respondents seem to be conceding Petitioner's point -- at page 3, they say that the WIC Statute "nowhere provides an enforcement mechanism which would require the state to apply for funds on a full need basis". If not in the

statute, where?

It is obvious that this case involves far more than a simple award of attorney's fees. In this case, the award hinges on questions of rights enforceable under 42 USC § 1983, of the legitimate expectations a state like New Mexico has when it enters into a federal-state partnership program like WIC, and of Congress's intent to create, or not, a private right of action when enacting a statute. These questions, as they appear in the case Petitioner asks to be reviewed, merit the attention of this Court.

Respectfully submitted,

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